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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 ELECTRONIC FRONTIER FOUNDATION,

15 Plaintiff,

16 vs.

17 DEPARTMENT OF JUSTICE,

18 Defendant.

Case No. 10-CV-4892-RS

**DEFENDANT'S SUPPLEMENTAL
MEMORANDUM**

1 At the May 31, 2012, hearing on the parties' cross-motions for summary judgment, counsel
2 for EFF discussed the United States District Court for the District of Columbia's decision in
3 *Electronic Frontier Foundation v. United States Dep't of Justice*, 826 F. Supp. 2d 157 (D.D.C.
4 2011) (Walton, J.). Pursuant to the Court's invitation, Defendant now files a supplemental
5 memorandum addressing whether the decision supports EFF's position that FBI should be required
6 to provide new Vaughn indices for its deliberative process withholdings.
7

8 In the case, Judge Walton held that Vaughn indices submitted by DOJ's Office of
9 Information Policy ("OIP") and Criminal Division did not provide the "minimal information
10 necessary" to support the Government's deliberative process withholdings, and, as a result, ordered
11 the Government to provide more detailed indices. *Id.* at 173 (internal quotation marks omitted).
12 As shown below, the specific deficiencies identified by Judge Walton are not true of FBI's more
13 detailed supporting materials here. Furthermore, the information Judge Walton ordered the
14 Government to provide in its amended indices is not relevant to the particular disputes that exist in
15 this case with respect to FBI's deliberative process withholdings. Consequently, the decision
16 offers no support for EFF's argument that FBI should be required to provide amended indices.
17

18 Judge Walton identified five specific deficiencies with the Government's Vaughn indices.
19 *First*, he held that the category descriptions in OIP's and the Criminal Division's indices "fail[ed]
20 to provide necessary contextual information about the particular decisionmaking processes to
21 which the withheld document contributed, and the role the withheld document played in those
22 processes." *Id.* at 168. No such deficiency is present here. As Defendant has previously
23 demonstrated, *see, e.g.*, Defendant's Reply In Support of Its Motion For Summary Judgment (ECF
24 No. 51) at 6-8, the category descriptions in FBI's Vaughn indices are highly detailed. FBI's
25 Vaughn indices also work in tandem with FBI's declarations. And with respect to each document
26
27

1 category to which FBI applied the deliberative process privilege, the Second Declaration of David
2 M. Hardy identifies the decision-making process at issue and the role the withheld information
3 played in that process. *Id.* These materials leave no doubt as to the predecisional and deliberative
4 nature of the withheld information.

5
6 *Second*, Judge Walton held that OIP and the Criminal Division did not provide sufficient
7 information about the identities, positions and job duties of the authors and recipients of the
8 documents at issue. *Id.* at 170. The Court appeared to be concerned that some of the information
9 withheld under the deliberative process privilege may have included communications from
10 employees with decision-making authority that reflected final agency positions. *See id.* Here, FBI
11 has repeatedly explained that it did not apply the deliberative process privilege to withhold final
12 agency positions. Second Hardy Decl. ¶ 46 (ECF No. 41); Fourth Hardy Decl. ¶ 12 (ECF No. 52).
13 Moreover, EFF has not offered any persuasive explanation for how additional information about
14 the job duties of FBI personnel would aid in the resolution of the current disputes that exist with
15 respect to FBI's deliberative process withholdings.

16
17 *Third*, Judge Walton held that the components' Vaughn indices did not make clear whether
18 documents designated as "drafts" were adopted by the agency or used by the agency in its dealings
19 with the public, which, according to Judge Walton, would mean that the agency could not claim the
20 deliberative process privilege over the materials. *Id.* at 170. Here, in contrast, FBI expressly
21 stated that it did not apply the privilege to any draft documents reflecting final agency positions.
22 Fourth Hardy Decl. ¶ 12 (ECF No. 52). Furthermore, FBI's Vaughn indices and declarations
23 demonstrate the predecisional and deliberative nature of the drafts withheld, which contain edits,
24 suggestions, comments and questions that are the hallmark of deliberative decision-making. *See*,
25 e.g., Second Hardy Decl. ¶ 45 (ECF No. 41)
26

1 *Fourth*, Judge Walton held that the components' Vaughn indices did not make it clear
2 whether DOJ had provided certain materials to individuals outside of DOJ, which would
3 potentially result in a waiver of DOJ's ability to rely upon the deliberative process privilege.
4 *Electronic Frontier Foundation v. United States Dep't of Justice*, 826 F. Supp. 2d at 171. In this
5 case, EFF has been able to identify the information that was provided by FBI to individuals outside
6 the Executive Branch, and the only question is whether FBI may properly apply the so-called
7 "consultant corollary" to these records. *See* Defendant's Reply in Support of its Motion for
8 Summary Judgment (ECF No. 12) at 20-23.

9
10 *Fifth*, Judge Walton held that DOJ's description of its segregability efforts were too
11 categorical for the Court to evaluate whether DOJ withheld non-deliberative factual material under
12 the deliberative process privilege. *Id.* at 174. In response, Judge Walton ordered a document-by-
13 document segregability analysis. *Id.* at 175. Such an order in this case would cause substantial and
14 unnecessary delay to the resolution of the case and would be at odds with the presumption of good
15 faith accorded to an agency's segregability determinations. *See* Defendant's Reply in Support of
16 its Motion for Summary Judgment (ECF No. 12) at 9. FBI has stated that it conducted a line-by-
17 line segregability analysis and there is no reason for this representation to be doubted. *Id.* at 9-10.
18 Indeed, the redactions that appear in the produced pages show a careful effort to redact only
19 exempt information. *Id.*

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21
22 In sum, Judge Walton's decision does not support ordering FBI to provide amended
23 Vaughn indices. FBI has provided extensive information in its two Vaughn indices, multiple
24 declarations and annotated productions that provide the Court with sufficient detail to resolve all
25 disputes over the application of the deliberative process privilege in FBI's favor.
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2 Dated: June 7, 2012

Respectfully Submitted,

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19
20
21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on June 7, 2012, I caused a copy of the foregoing to be served on
23 counsel for Plaintiff via the Court's ECF system.
24

25 /s/ Nicholas Cartier
26 NICHOLAS CARTIER
27